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In the Supreme Court of the United States

OCTOBER TERM, 1983

LEO E. BALK, PETITIONER

v.

UNITED STATES INTERNATIONAL COMMUNICATIONS
AGENCY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner, a GS-11 Foreign Language Broadcaster in the U.S.S.R. Division of the Voice of America, seeks relief from the United States International Communication Agency's (USICA) alleged employment discrimination (Pet. App. 4). He contends that the court of appeals erroneously dismissed as moot his appeal from an order of the district court that dismissed his complaint (which alleged employment discrimination on the basis of age, national origin and gender) for failure to exhaust administrative remedies.

1. On July 3, 1980, petitioner filed an Equal Pay Act claim with the USICA (Pet. App. 5). After a series of refilings and appeals of his original complaint with USICA and the Office of Personnel Management, petitioner filed a civil complaint in the United States District Court for the District of Columbia on July 8, 1981 (*id.* at 4). His amended

complaint set forth three causes of action: (1) a claim under Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e-16; (2) a claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. V) 633a (ADEA); and (3) a claim under the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1) (Pet. App. 4-5). The district court dismissed the suit without prejudice for failure to exhaust administrative remedies (Pet. App. 10-11), and petitioner filed a notice of appeal on October 15, 1982. In the interim, however, petitioner filed an administrative complaint with the Equal Opportunity Office at USICA, which was rejected as untimely on December 17, 1982. Because the sole issue before the court of appeals — whether petitioner's complaint was properly dismissed for failure to exhaust administrative remedies — was thereby rendered moot, the court vacated the district court's opinion and order and remanded the case for dismissal pursuant to *United States v. Munsingwear*, 340 U.S. 36, 39 & n.2 (1950) (Pet. App. 1-3).¹

2. The court of appeals properly dismissed petitioner's appeal because the only issue before the court was rendered moot by petitioner's filing and the USICA's rejection of his administrative complaint. The court of appeals' consideration of the propriety of the district court's dismissal order, in these circumstances, would have been purely academic.

In any event, the district court correctly dismissed petitioner's Title VII and ADEA claims because he did not even seek, let alone exhaust, his administrative remedies prior to filing his complaint. Both Title VII and the ADEA set forth specific administrative schemes that an aggrieved employee

¹Following dismissal of his appeal, petitioner filed a motion in the district court to toll the statute of limitations for filing a new claim. The district court denied petitioner's motion to toll the statute of limitations with respect to his Title VII and ADEA claims, but allowed him to pursue his Equal Pay Act claim. Order of August 15, 1983.

must pursue before he may file suit in federal court, and petitioner unquestionably failed to follow these procedures before commencing the present litigation.

Section 717(c) of Title VII authorizes a civil action after the petitioner has first filed a complaint with the agency. If no final action is taken within 180 days after such filing, the employee may bring suit in federal court. 42 U.S.C. 2000e-16(c).² Otherwise, he may sue within 30 days of his agency's final action. *Ibid.*; see also *Brown v. GSA*, 425 U.S. 820, 829, 832 (1976) (employee must exhaust administrative remedies before bringing suit in federal court); *President v. Vance*, 627 F.2d 353, 360 (D.C. Cir. 1980) (same). Under the ADEA, 29 U.S.C. 633a(c) and (d),³ an employee may

²Section 717(c), 42 U.S.C. 2000e-16(c), provides in relevant part:

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section * * * on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section * * *, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit * * * until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

³Section 633a(d) states:

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

either file an administrative complaint with the employer agency or sue in federal court, but only after giving a 30-day notice to the EEOC of his intent to sue.⁴ Such notice must be given within 180 days of the alleged discriminatory practice. *Ibid.*

It is undisputed that petitioner did not seek any administrative review of his Title VII and ADEA claims before he filed suit in the district court, nor did he provide the EEOC with notice of his intention to sue.⁵ Petitioner thus failed to comply with the exhaustion requirement of Title VII and the administrative notice requirement of the ADEA. Dismissal of petitioner's Title VII and ADEA claims in these circumstances was entirely proper.

The district court's dismissal of petitioner's Equal Pay Act claim for failure to exhaust administrative remedies is somewhat problematic, inasmuch as the D.C. Circuit has held that exhaustion is not required prior to seeking judicial relief. *Ososky v. Wick*, 704 F.2d 1264 (1983). See also *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (failure to exhaust collective bargaining grievance procedures does not bar civil suit against private party). This issue, however, is not appropriate for this Court's review because petitioner will suffer no prejudice

⁴The Act now authorizes the EEOC to decide ADEA claims. The Civil Service Commission formerly handled these claims. See 43 Fed. Reg. 19807 (1978); 29 C.F.R. 1613.501-1613.521.

⁵Petitioner's original administrative complaint of July 3, 1980, merely stated that he had been denied equal pay for equal work and made no reference to any other type of discrimination (Pet. App. 5). That complaint, therefore, did not involve Title VII or ADEA administrative procedures.

from the dismissal of his appeal. Pursuant to the district court's order of August 15, 1983, petitioner is free to pursue his Equal Pay Act claim.⁶

It is respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1983

⁶Any difficulties with the Equal Pay Act's statute of limitations (29 U.S.C. 255(a)) may be cured by resort Rule 60(b)(6), Fed. R. Civ. P.